IN THE
SUPREME COURT OF MISSOURI

No. SC85101

MARK A. VERDOORN,

Respondent,

v.

DIRECTOR OF REVENUE, STATE OF MISSOURI,

Appellant.

Appellant's Substitute Brief

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Table of Contents

Table of Authorities 2

Jurisdictional Statement 4

Statement of Facts 5

Point Relied On 12

Argument 13

Standard of review 14

The Director's prima facie case 14

Deputy Cowan had probable cause 15

Verdoorn had a BAC in excess of the legal limit 16

Quantifying the Director's burden 17

Under any standard, Verdoorn failed to rebut the Director's prima facie case 22

Summary 27

Conclusion 29

Certification of Service and of Compliance with Rule 84.06(b) and (c) 30

Appendix 31

Appendix Index A1

Table of Authorities

Cases:

Andersen v. Director of Revenue, 944 S.W.2d 222

(Mo.App., W.D. 1997) 15, 17-20, 23, 25

Chinnery v. Director of Revenue, 885 S.W.2d 50 (Mo.App., W.D. 1994) 15

Collins v. Director of Revenue, 691 S.W.2d 246 (Mo. banc 1985) 25

Duffy v. Director of Revenue, 966 S.W.2d 372 (Mo.App., W.D. 1998) 15

Green v. Director of Revenue, 961 S.W.2d 936 (Mo.App., E.D. 1998) 15, 17, 24, 27

Guccione v. Director of Revenue, 988 S.W.2d 649 (Mo.App., E.D. 1999) 18

Hamm v. Director of Revenue, 20 S.W.3d 924 (Mo.App., S.D. 2000) 24

Hieger v. Director of Revenue, 733 S.W.2d 491 (Mo.App., E.D. 1987) 27

Kinzenbaw v. Director of Revenue, 62 S.W.3d 49 (Mo. banc 2001) 20

Mark A. Verdoorn v. Director of Revenue, No. WD60784

(Mo.App., W.D. November 5, 2002) 11, 18, 19, 22

McCloskey v. Koplar, 329 Mo. 527, 46 S.W.2d 557 (Mo. 1932) 20

Menzenworth v. Metropolitan Life Insurance Co., 249 S.W. 113 (Mo.App., 1923) 20

Meyer v. Director of Revenue, 34 S.W.3d 230 (Mo.App., E.D. 2000) 14, 16, 24, 26

Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976) 14

Niehaus v. Director of Revenue, 877 S.W.2d 250 (Mo.App., W.D. 1994) 14

Rhodes v. Director of Revenue, 994 S.W.2d 597 (Mo.App., S.D. 1999) 14, 16, 24, 26

Smith v. Director of Revenue, 13 S.W.3d 700 (Mo.App., W.D. 2000) 14, 24

Smyth v. Director of Revenue, 57 S.W.3d 927 (Mo.App., S.D. 2001) 18

State v. Kubik, 456 N.W.2d 487 (Neb. 1990) 26

Testerman v. Director of Revenue, 31 S.W.3d 473 (Mo.App., W.D. 2000) 14

Walker v. Director of Revenue, 922 S.W.2d 57 (Mo.App., E.D. 1996) 19, 27

Wilcox v. Director of Revenue, 842 S.W.2d 240 (Mo.App., W.D. 1992) 15

Wisdom v. Director of Revenue, 988 S.W.2d 127 (Mo.App., S.D. 1999) 14

Statutes:

Article V, Section 10, Missouri Constitution (as amended 1982) 4

§302.500, RSMo 2000 . . . . . 12, 13

§302.505.1, RSMo 2000 14

§302.505, RSMo 2000 . . . . . 4, 5

§302.505, RSMo Cum.Supp. 2002 17

§302.530.4, RSMo 2000 . . . . . 4, 5

§302.535, RSMo 2000 . . . . . 4, 5

§302.545, RSMo 2000 . . . . . 12, 13

Other:

BLACK'S LAW DICTIONARY, 190 (Seventh ed. 1999) 20

Jurisdictional Statement

This appeal is from the judgment of the Circuit Court of Platte County ordering reinstatement of Mark A. Verdoorn's (Verdoorn) driving privileges, originally suspended pursuant to §§302.505 and 302.530.4, RSMo 2000,[1] by the Director of Revenue (Director). The trial court reinstated Verdoorn's driving privileges following a trial de novo, §302.535, and the Director appealed. After an opinion by the Court of Appeals, Western District, this Court took transfer of the case on the Director's application. Therefore, jurisdiction lies in this Court. Article V, Section 10, Missouri Constitution (as amended 1982).

[1]All statutory citations are to RSMo 2000, unless otherwise indicated.

Statement of Facts

On June 23, 2001, the Director of Revenue (Director) suspended Verdoorn's driving privileges pursuant to §§302.505 and 302.530.4 (LF 7). On June 15, 2001, pursuant to §302.535, Verdoorn sought a trial de novo before the Circuit Court of Platte County (LF 4-5). On October 18, 2001, the court heard the matter (Tr. 2). The parties submitted the case on documentary evidence alone (Tr. 2-10). In particular, the Director offered, and the court admitted, certified records from the Department of Revenue as Respondent's Exhibit A (Tr. 4-5; LF 53-66; Appendix at A10 - A23). Verdoorn offered, over the Director's objection, the telephone deposition of Dr. William Watson, and deposition exhibits 1 and 2 in support of his so-called "metabolic curve defense" (Tr. 4-6). The court received the deposition into evidence, along with the deposition exhibits, which were then designated Petitioner's Exhibits 1 and 2 (Tr. 9; LF 9-52 (Petitioner's Exhibits 1 and 2), LF 67-80 (Telephone Deposition of Dr. William Watson)).

Respondent's Exhibit A, the certified records from the Department of Revenue that include the Alcohol Influence Report, show the following:

On March 29, 2001, at approximately 1:40 am, Deputy Brian Cowan of the Platte County Sheriff's Department was traveling northbound on I-29 when he noticed a vehicle also traveling northbound that was failing to maintain a single lane of traffic (LF 58). Deputy Cowan noted that as the car continued going northbound, it crossed over onto the shoulder and traveled on the shoulder for several feet (LF 58). The driver then tried to correct himself, and

get back into the lane, but in the course of doing so, over corrected and then straddled the two lanes of traffic (LF 58). The driver continued swerving between the shoulder and into both lanes of traffic even as the highway widened into three lanes (LF 58). Deputy Cowan activated his lights and siren and conducted a traffic stop at I-29 at Mexico City Avenue (LF 54, 58).

Deputy Cowan identified the driver as Verdoorn (LF 58). While speaking with Verdoorn, Deputy Cowan noticed a strong odor of an intoxicating beverage on his breath; Verdoorn's eyes were also bloodshot and glassy (LF 54, 58). Deputy Cowan asked Verdoorn if he had been drinking and Verdoorn stated that he had a couple of beers (LF 58). Deputy Cowan asked Verdoorn to perform some standard field sobriety tests, and Verdoorn agreed to do so (LF 58).

Deputy Cowan first did the gaze nystagmus test on Verdoorn (LF 58). Verdoorn lacked smooth pursuit in both eyes, and he had distinct nystagmus and onset before 45 degrees in both eyes, with some white showing (LF 54, 58). Deputy Cowan noticed that, during the test, Verdoorn swayed while trying to maintain his balance (LF 58).

Next, Deputy Cowan asked Verdoorn to perform the walk and turn test (LF 58). Verdoorn could not maintain his stance, began the test before being told to do so, used his arms for balance, did not touch heel to toe throughout the entire test, stepped off the line, and made an improper turn by stepping off the line and turning in the wrong direction (LF 54, 58).

Finally, Deputy Cowan administered the one leg stand test to Verdoorn (LF 54, 58). Verdoorn swayed while trying to maintain his balance, used his arms to help with balance, put

his foot down four times in the early part of the test, and, ultimately, was unable to complete the test (LF 54, 58).

Deputy Cowan arrested Verdoorn for driving while intoxicated (LF 58). After securing Verdoorn, Deputy Cowan searched Verdoorn's car and found a brown paper bag on the floorboard of the back seat that contained a six-pack carrier of Bud Light beer bottles (LF 58). Three of the bottles were open and empty; the other three bottles were still sealed (LF 58). Deputy Cowan also found a small amount of a clear liquid on the floor mat in front of the driver's seat which had a strong odor of an intoxicating beverage (LF 58).

Deputy Cowan took Verdoorn to the Platte County Jail for a breath test (LF 58). After Deputy Cowan advised Verdoorn of his rights pursuant to Missouri's Implied Consent Law, Verdoorn agreed to submit a breath test (LF 56, 59). Deputy Cowan set up the Datamaster, then searched Verdoorn's mouth for contraband (LF 59). Deputy Cowan found that Verdoorn had a penny in his mouth (LF 59). Verdoorn explained that he had a penny in his mouth because they taste good and he enjoys sucking on them (LF 59). Deputy Cowan began another 15-minute observation period, and informed Verdoorn that if he persisted in trying to give an invalid sample, he would be marked as a refusal (LF 59). Verdoorn said it did not matter, because he would pass the test anyway (LF 59). During this discussion with Verdoorn, the Datamaster ran a test cycle and printed out an incomplete ticket (LF 59, 62).

Verdoorn then asked to speak to an attorney (LF 56, 59). Deputy Cowan allowed Verdoorn twenty minutes to contact his attorney; Verdoorn wanted Deputy Cowan to contact his attorney for him (LF 59). After the expiration of twenty minutes, Deputy Cowan asked

Verdoorn if he would take the breath test, and Verdoorn agreed (LF 59). Verdoorn reiterated that he was going to pass the test, because he was merely "tipsy," and not drunk (LF 59). Breath testing revealed that Verdoorn's blood alcohol content was .126 (LF 56, 59, 62). Verdoorn then refused to answer questions in conjunction with the interview portion of the Alcohol Influence Report (LF 55, 59). Deputy Cowan issued summonses to Verdoorn for operating a motor vehicle in an intoxicated condition, failing to drive within a single lane on a highway having three or more lanes, and failing to exhibit satisfactory evidence of insurance upon demand of a peace officer (LF 60-61).

At his trial de novo, Verdoorn submitted the deposition transcript of Dr. William Watson, a doctor of pharmacy and toxicologist (LF 71). In formulating his opinion, Dr. Watson relied on several facts: information provided in a letter from counsel,[2] various pieces of information from the Alcohol Influence Report and other Department of Revenue documents, and information provided by Verdoorn (LF 72-73). More particularly, Dr. Watson relied on Verdoorn's information that he engaged in "binge drinking" beer – drinking "a beer as rapidly as one every five minutes" – between 1:15 and 1:30 a.m. at a bar and drinking beer in the car (LF 73-74). Dr. Watson also considered that Verdoorn drove "a short distance, roughly ten to fifteen minutes" and was stopped at 1:43 a.m. (LF 73-74). Dr. Watson assumed that the Datamaster result of .126 was accurate and that the test was administered at 2:41 or 2:43 a.m. (LF 74). Finally, Dr. Watson considered Verdoorn's height, weight, and age, as

[2]This letter is apparently not part of the record on appeal.

indicated on the Alcohol Influence Report (LF 73). The parties stipulated that "the facts that the doctor used to reach his opinion would be the testimony of Mr. Verdoorn if he were testifying in this matter" (Tr. 7).

With this information, Dr. Watson rendered the following opinion:

A. Ok. My opinion to a reasonable degree of toxicologic certainty, the exact concentration at the time of first contact is indeterminate because of the type of drinking that was involved, that it was, one, lower than 0.126 grams percent and, in fact, could have been either above or below 0.1 grams percent.

Q. [Verdoorn's counsel] Would it be fair to say that it was your opinion however that clearly it would have been below a .126?

A. Yes.

Q. Would it be fair to say that whether his blood alcohol concentration was above a .10 or below or each of those possibilities are equally probable?

A. It's hard to put an exact mathematical value on it because of the difficulty in doing the calculations in a situation like this, but I have no information to tell me that it wouldn't be approximately . . .

Q. That it wouldn't be approximately what, Dr. Watson, I'm sorry?

A. Equally likely that it was above or below.

Q. The opinion that you've given, is that based upon certain scientific principles that are generally accepted in the profession of toxicology and pharmacology?

A. Yes. It is.

(LF 76-77).

On October 31, 2001, the court entered its Judgment (LF 81-83). It found that Dr. Watson testified

> that if Mr. Verdoorn engaged in binge drinking immediately prior to 1:30 a.m. and then continued to drink until the time he was stopped, that it would be his opinion, to a reasonable scientific and toxicological certainty, that there would be fifty (50%) percent probability that his blood alcohol concentration was in excess of 0.10 grams and a fifty (50%) percent probability that his blood alcohol concentration would be lower than that amount. In summary, he testified that it was equally probable that the Petitioner's blood alcohol concentration was either above or below the .10 standard.

(LF 82). Relying upon the testimony of Dr. Watson, the court concluded that, "Respondent has failed in meeting its burden of persuasion that the Petitioner had a blood alcohol concentration greater than .10 percent at the time of his driving and, accordingly, the Petition for Trial De Novo should be sustained" (LF 82).

The Director timely filed a notice of appeal on December 10, 2001 (LF 85). The case was heard in the Missouri Court of Appeals, Western District, which issued its opinion on

November 5, 2002. In its opinion, the Western District found that the Director made a prima facie case that Verdoorn failed to rebut. *Mark A. Verdoorn v. Director of Revenue,* No. WD60784 (Mo.App., W.D. November 5, 2002). But more particularly, as to the level of proof required of a driver, the Western District also held that a driver's rebuttal evidence had to "raise a genuine issue of fact regarding the validity of the blood alcohol test results" and "be substantial and competent to challenge the presumption of validity established by the Director's prima facie case." *Id., slip op.* at 10. On February 11, 2003, the Director sought transfer to this Court, which was granted.

Point Relied On

I.

The trial court erred in setting aside the Director's suspension of Verdoorn's driving privileges pursuant to §§ 302.500-302.545, RSMo, because its judgment erroneously applies the law and is against the weight of the evidence in that (1) the Director established a prima facie case for suspension by showing that (a) Deputy Cowan arrested Verdoorn upon probable cause to believe that he was driving while intoxicated; and (b) Verdoorn was driving with a blood alcohol concentration of .10% or greater; and (2) Verdoorn's expert evidence that it was equally likely that his blood alcohol concentration was above or below .10 basically proved nothing, and certainly did not rebut the Director's prima facie case under any standard, including by a preponderance of the evidence.

Andersen v. Director of Revenue, 944 S.W.2d 222 (Mo.App., W.D. 1997)

Green v. Director of Revenue, 961 S.W.2d 936 (Mo.App., E.D. 1998)

Kinzenbaw v. Director of Revenue, 62 S.W.3d 49 (Mo. banc 2001)

Argument

I.

The trial court erred in setting aside the Director's suspension of Verdoorn's driving privileges pursuant to §§ 302.500-302.545, RSMo, because its judgment erroneously applies the law and is against the weight of the evidence in that (1) the Director established a prima facie case for suspension by showing that (a) Deputy Cowan arrested Verdoorn upon probable cause to believe that he was driving while intoxicated; and (b) Verdoorn was driving with a blood alcohol concentration of .10% or greater; and (2) Verdoorn's expert evidence that it was equally likely that his blood alcohol concentration was above or below .10 basically proved nothing, and certainly did not rebut the Director's prima facie case under any standard, including by a preponderance of the evidence.

The trial court held that the Director did not meet her burden of proving that Verdoorn had a blood alcohol concentration (BAC) of greater than .10% at the time he was driving (LF 92). The trial court fundamentally misapprehended the law, and consequently did not assign the proper weight to the evidence before it. As discussed below, the Director established her prima facie case: Verdoorn did not dispute the officer's probable cause, and did not object to the introduction of the test result itself. Verdoorn likewise did not rebut the Director's prima facie case because his expert could not and did not testify that Verdoorn's BAC was below .10% at the time of driving. The best that the expert could offer was an opinion that

Verdoorn's BAC was below .126%, and was equally as likely to be above or below .10%. "Fifty-fifty" has never been the standard for rebuttal under well established case law, nor should it be.

Standard of review

An appellate court must affirm the decision of the circuit court to reinstate a driver's driving privileges unless it is not supported by substantial evidence, it is against the weight of the evidence, it erroneously declares the law or it erroneously applies the law. *Murphy v. Carron,* 536 S.W.2d 30, 32 (Mo. banc 1976). When reviewing a judgment in a driver's license case, an appellate court must view the evidence and all reasonable inferences drawn therefrom in the light most favorable to the judgment. *Niehaus v. Director of Revenue,* 877 S.W.2d 250, 251 (Mo.App., W.D. 1994). In this case, the trial court's judgment erroneously applies the law and is against the weight of the evidence.

The Director's prima facie case

Under §302.505.1, the Director makes a prima facie case for suspending a driver's license by establishing that (1) the arresting officer had probable cause to arrest the driver for driving while intoxicated, and (2) the driver's BAC was at least .10 percent at the time of the test. *Testerman v. Director of Revenue,* 31 S.W.3d 473, 475 (Mo.App., W.D. 2000); *see also Smith v. Director of Revenue,* 13 S.W.3d 700, 705 (Mo.App., W.D. 2000); *Rhodes v. Director of Revenue,* 994 S.W.2d 597, 598 (Mo.App., S.D. 1999); *Wisdom v. Director of Revenue,* 988 S.W.2d 127, 129 (Mo.App., S.D. 1999); *Meyer v. Director of Revenue,* 34 S.W.3d 230, 232 (Mo.App., E.D. 2000). Once the Director has made a prima facie case, the

burden shifts to the driver to establish that his BAC was less than the statutory limit. *Andersen v. Director of Revenue,* 944 S.W.2d 222, 224 (Mo.App., W.D. 1997); *see also Green v. Director of Revenue,* 961 S.W.2d 936, 938 (Mo.App., E.D. 1998).

Deputy Cowan had probable cause

An arresting officer has probable cause to believe that an individual is driving while intoxicated where the facts and circumstances would warrant a person of reasonable caution to believe that an offense has been committed. *Chinnery v. Director of Revenue,* 885 S.W.2d 50, 51 (Mo.App., W.D. 1994). "The standard for determining probable cause is the probability of criminal activity, not a prima facie showing of guilt." *Wilcox v. Director of Revenue,* 842 S.W.2d 240, 243 (Mo.App., W.D. 1992). In examining the existence of probable cause, courts consider the information possessed by the officer before the arrest and the reasonable inferences drawn therefrom. *Duffy v. Director of Revenue,* 966 S.W.2d 372, 380 (Mo.App., W.D. 1998).

The Director's evidence presented at the hearing was more than sufficient to establish probable cause. First, Deputy Cowan stopped Verdoorn after he saw Verdoorn fail to maintain in a single lane of traffic, and swerve back and forth onto the shoulder and into both lanes of traffic (LF 49). Second, (1) Cowan "detected a strong odor of an intoxicating beverage on [Verdoorn's] breath;" (2) Verdoorn was unsteady on his feet, had bloodshot and watery eyes and slurred speech; (3) Verdoorn admitted to Cowan at the scene that he had been drinking before he was stopped; (4) Verdoorn performed poorly on three field sobriety tests – the "one leg stand," "walk-and-turn" and "gaze nystagmus" tests – at the scene of the stop; (5) the officer

found a six-pack of Bud Light beer bottles, with three open and three unopened, in a brown paper bag on the floorboard behind the passenger and driver's seat; and (6) he found "a small amount of clear liquid on the floor mat in front of the driver's seat, which had a strong odor of an intoxicating beverage." (LF 40-49). These facts gave Deputy Cowan probable cause to believe Verdoorn was driving his motor vehicle in an intoxicated condition.

At the hearing, Verdoorn did not offer any evidence or testimony refuting any of the aforementioned observations made by Deputy Cowan in the Alcohol Influence Report (Tr. 2-10). Indeed, in his brief before the Court of Appeals, Verdoorn admitted as much - "[a]t the time of trial, the Respondent [Verdoorn] did not contest the legitimacy of the probable cause for his arrest or the lawfulness of his arrest for DWI" (Resp. W.D. Br. at 3). Probable cause cannot reasonably be disputed in this case.

Verdoorn had a BAC in excess of the legal limit

In order to make a prima facie case on the second element, the Director must establish "by credible and competent evidence that proper chemical analysis showed a driver's [BAC] was .10% or more by body weight." *Meyer v. Director of Revenue,* 34 S.W.3d at 232 (*citing Rhodes v. Director of Revenue,* 994 S.W.2d at 598). The Director's evidence showed that Verdoorn had a BAC of .126%, which is above the then-statutory limit of .10% (Tr. 5).[3]

The Director's evidence, Exhibit A, contains (1) the Alcohol Influence Report filled out

[3]At the time Verdoorn was arrested, on March 29, 2001, the legal limit was .10%. Effective September 29, 2001, the legal limit was lowered to .08%. *See* §302.505, RSMo Cum.Supp. 2002.

by the arresting officer, Deputy Cowan, who also administered the breath test (LF 53-57), (2) an operational checklist for the Datamaster breath analyzer machine (LF 56), (3) a certification of Verdoorn's breath test result of .126% by body weight (LF 56), (4) a two-page typewritten and signed narrative account by Deputy Cowan detailing the arrest and breath test of Verdoorn (LF 58-59), (5) certification by Deputy Cowan that he is authorized to operate the Datamaster (LF 56), (6) both the failed and completed BAC Datamaster Tickets (LF 62), (7) the Datamaster maintenance report (LF 63), and (8) the certificate of analysis (LF 64). Because the Director's evidence established the accuracy of the BAC test results, the Director established her prima facie case. Verdoorn never disputed that the Director met her burden to make a prima facie case - indeed, as noted, he never objected to the Director's evidence in this regard at all.

Quantifying the Director's burden

Once the Director established her prima facie case that Verdoorn's BAC equalled or exceeded .10, the burden shifted to Verdoorn to establish that his BAC was less than the statutory limit. *Andersen v. Director of Revenue,* 944 S.W.2d at 224; *see also Green v. Director of Revenue,* 961 S.W.2d at 938. For the Court of Appeals, Western District, the problem began here. Instead of applying the burdens as they had been consistently applied across the state for years, the Western District decided to adopt a new framework. This new framework is as obtuse as it is wrong.

Prior to its opinion in *Mark A. Verdoorn v. Director of Revenue,* No. WD60784 (Mo.App., W.D. November 5, 2002), the Western District, like the other districts of the Court

of Appeals, had held that once the Director makes a prima facie case, the burden then shifts to the driver to disprove that case by a preponderance of the evidence. *Andersen v. Director of Revenue*, 944 S.W.2d 222, 224 (Mo.App., W.D. 1999); *Smyth v. Director of Revenue*, 57 S.W.3d 927, 930 (Mo.App., S.D. 2001); *Guccione v. Director of Revenue*, 988 S.W.2d 649, 652 (Mo.App., E.D. 1999). And indeed, this approach makes sense. Once the Director has made a prima facie case, and shown by a preponderance of the evidence that certain propositions are true, then the driver, too, should have to come forth with evidence that shows – by a preponderance of the evidence – that the propositions are not true. Were it otherwise, the driver could just come forward with "really good evidence" or "possibly plausible evidence" or any number of other permutations of qualitative characterizations of evidence in order to prevail. But this is not the standard, nor should it be. In order to parry the Director's prima facie case, established by a preponderance of the evidence, the driver must match or exceed the persuasive level of the Director's evidence in order to overcome it.

The Western District, in *Verdoorn*, properly recognized that once the Director makes her prima facie case, the issue becomes one of "the quantum of evidence necessary for the driver to rebut the Director's case." *Verdoorn v. Director of Revenue*, *supra*, slip op. at 6. But then the Western District got sidetracked by the burden of proof and who has it.

The Western District noted that decisions prior to 1997 regarding trials de novo "consistently reflect that, in rebutting the Director's case, the driver's defense should consist of 'some evidence' that the blood alcohol test results were invalid or unreliable." *Id.*, slip op. at 7, *citing Walker v. Director of Revenue*, 922 S.W.2d 57, 58 (Mo.App., E.D. 1996). The

Western District thus explained their view of the burden of proof:

> Under this line of [pre-1997] cases, a Director's prima facie case shifted the burden of *production* to the driver to advance evidence that his blood alcohol level did not exceed the legal limit. The burden of persuasion, however, remained on the Director at all times.

Id., slip op. at 7 (citations omitted, emphasis in original).

The Western District continued by discussing *Andersen v. Director of Revenue*, 944 S.W.2d at 224, and characterizing it as some sort of a seismic shift in the allocation of burdens because "[t]he case was remanded with instructions that if the Director makes a prima facie case, 'the circuit court shall place the burden on Andersen to establish by a preponderance of the evidence that his BAC was less than .10% .'" *Verdoorn v. Director of Revenue*, *supra*, slip op. at 7. According to the Western District, the remand, as ordered, was improper because it shifted the burden of *proof* to the driver. *Id.*, slip op. at 7-8 (emphasis supplied).

But the Western District, in *Andersen*, did not shift the burden of proof. Most recently, this Court has explained the distinctions between the burdens of pleading, production, proof, and persuasion, as follows:

> When courts discuss the burden of proof, there are two components: the burden of producing (or going forward with) evidence and the burden of persuasion. *See McCloskey v. Koplar*, 329 Mo. 527, 46 S.W.2d 557, 561-63 (Mo. 1932).

> Cases also refer to a burden of proof on an issue. *See, e.g.*, *Menzenworth v. Metropolitan Life Insurance Co.*, 249 S.W. 113, 115 (Mo.App., 1923).

Kinzenbaw v. Director of Revenue, 62 S.W.3d 49, 53-54 (Mo. banc 2001).

> The common understanding, as set forth in Black's Law Dictionary, is that the burden of persuasion is "a party's duty to convince the fact-finder to view the facts in a way that favors that party." BLACK'S LAW DICTIONARY, 190 (Seventh ed. 1999). The burden of producing evidence is "a party's duty to introduce enough evidence on an issue to have the issue decided by the fact-finder, rather than decided against the party in a peremptory ruling such as a summary judgment or a directed verdict." *Id.*

Id. at n.6.

As these definitions show, requiring the driver to rebut the Director's prima facie case by a preponderance of the evidence does not shift the burden of proof or persuasion to the driver. Rather, it places a burden of production upon the driver – the burden to produce evidence that negates the Director's prima facie case. And, to answer the Western District's question, the quantum of evidence required simply must be a preponderance of the evidence. As noted, if the Director's evidence shows a certain proposition to be true by a preponderance of the evidence, the only way to deflect and defeat that would be for the driver, likewise, to show a contrary proposition by a preponderance of the evidence.

This rule does not impermissibly shift the burden of proof or persuasion to the driver. After all, the Director must establish two propositions in administrative denial cases by a preponderance of the evidence – that there was probable cause to arrest the driver for driving while intoxicated and that the driver had a BAC that equalled or exceeded the legal limit. The driver, however, merely bears a burden of production, and need only defeat one of the Director's elements, not both. The Director bears and retains the burden of persuasion and proof on both elements; the driver must only produce contrary evidence on one element in order to prevail.

In this context, it becomes plain that it would be a step backwards to resurrect the pre-1997 rule that the Western District endorses. As noted by the Western District, "decisions issued prior to 1997 consistently reflect that, in rebutting the Director's case, the driver's defense should consist of 'some evidence' that the blood alcohol test results were invalid or unreliable." *Verdoorn v. Director of Revenue, supra*, slip op. at 7 (citations omitted). But how much evidence is "some evidence"? How persuasive must it be, if at all? Or does the rule simply mean that the driver must merely present "some" evidence, and if he presents any, he is entitled to prevail? The Western District did not say. What they did say in articulating the test – or perhaps rearticulating the earlier standard – was that the driver "is entitled to present rebuttal evidence which raises a genuine issue of fact." *Verdoorn v. Director of Revenue, supra*, slip op. at 10. This evidence "must be substantial and competent to challenge the presumption of validity established by the Director's prima facie case; but the driver's burden is one of production not persuasion."

But this new standard provides little, if any, assistance to litigants. All that can be said for the Western District's opinion is that evidence that boils down to a coin toss of the Verdoorn ilk will not be sufficient to rebut the Director's prima facie case. For this and all the above-stated reasons, the preponderance standard should be maintained in terms of the quantum of evidence by which a driver must rebut.

Under any standard, Verdoorn failed to rebut the Director's prima facie case

Even under the Western District's newly-minted iteration of the driver's burden, Verdoorn failed to rebut the Director's prima facie case.

In his attempt to do so, Verdoorn introduced the deposition of Dr. William Watson (Tr. 5-8). Dr. Watson stated twice in his deposition that Verdoorn's BAC was equally likely to be above or below .10% at the time he was driving and stopped by Deputy Cowan (LF 76-77; *see also* Tr. 8). Dr. Watson also admitted that he did not have any evidence that would show that Verdoorn's BAC was below .10% (LF 77). In other words, Verdoorn's own witness could not establish that Verdoorn's BAC was below .10% at the time of the test. Because Verdoorn did not submit any substantive evidence to show that his BAC was below .10% at the time of the test, Verdoorn failed to rebut the Director's prima facie case, by a preponderance of the evidence or otherwise.

The trial court, apparently concerned with Dr. Watson's testimony, held that the Director did not meet her burden of proving that Verdoorn "had a blood alcohol concentration greater than .10 percent at the time of his driving." (LF 92). The trial court misapplied the law.

First, the Director must prove that the driver's BAC *equalled* or exceeded .10. The trial

court misstated the test when it excluded the possibility of the driver's BAC equaling the legal limit.

Second and perhaps more fundamentally, Missouri courts have repeatedly held that expert testimony that a drunk driver's BAC "may have been" below the legal limit at the time the driver was driving is insufficient to rebut the Director's prima facie case. *Andersen v. Director of Revenue,* 944 S.W.2d at 223-224; *Smith v. Director of Revenue,* 8 S.W.3d 179, 181 (Mo.App., E.D. 1999); *Green v. Director of Revenue,* 961 S.W.2d at 938-939; *Meyer v. Director of Revenue,* 34 S.W.3d at 235-236; *Rhodes v. Director of Revenue,* 994 S.W.2d 587; *Hamm v. Director of Revenue,* 20 S.W.3d 924 (Mo.App., S.D. 2000).

For example, in *Green v. Director of Revenue,* the Director appealed the trial court's decision to overturn the Director's suspension of the driver's driving privileges. 961 S.W.2d at 938. The driver testified at trial that he drank two beers "an hour before he was stopped and an hour and a half before the test." *Id.* at 939. He also testified that he chugged the last half of his girlfriend's beer about five minutes before he was stopped, and 36 minutes before he was tested. *Id.* at 938-939. The driver's expert witness, a doctor and associate professor of toxicology and pharmacology, testified that in his opinion, the driver's BAC was rising at the time of the test. *Id.* at 938. The doctor further testified that the "'rising alcohol effect' demonstrates that [the driver's] BAC at the actual moment of driving could have been either lower or higher than the .104 percent recorded 31 minutes after he was stopped." *Id.* Based on the expert's testimony, the trial court overturned the suspension.

But the Court of Appeals, Eastern District, reversed, holding that the expert's testimony

"was insufficient to rebut the presumption created by the test results." *Id.* at 939. The Court held that the expert testimony did not rebut the Director's case because the evidence before the court simply did not show that he had "a BAC of less than .10 percent at the time he was driving." *Id.* at 939. And where the evidence does not show, by a preponderance of the evidence, that the driver's BAC was below .10 at all, it can hardly be said to be "substantial and competent evidence" on that same point.

Similarly in *Andersen v. Director of Revenue*, a police officer stopped and arrested the driver for driving while intoxicated. 944 S.W.2d at 223. Approximately 56 minutes after the initial stop, the officer administered a breath test and it indicated a BAC of .10%. *Id.* at 223. The driver argued at trial that his BAC was much lower than .10% at the time he was driving because he "had 'chugged' down a bottle of beer briefly before an officer stopped his pickup and that his BAC was rising when the officer gave him the breath test." *Id.* The trial court concluded that the Director did not establish a prima facie case that the driver's BAC was .10% when he was driving because the "'chugged' beer should have caused [the driver's] BAC to rise." *Id.*

On appeal, the Court of Appeals, Western District, overturned the trial court's decision and remanded for a new trial. The court held that the trial court had "required the director to prove more than she was obligated to prove." *Id.* Following the standard set by the Missouri Supreme Court in *Collins v. Director of Revenue*, the Western District held that the Director establishes a prima facie case that the driver was driving while intoxicated "if the director establishes by credible and competent evidence that a driver was arrested on probable cause

and that the proper chemical analysis shows that a driver was driving while intoxicated." *Id.* (*citing* 691 S.W.2d 246, 252 (Mo. banc 1985)). The Director is not required to defeat a possible blood alcohol curve defense as part of the prima facie case, nor is a driver's "beer chugging" evidence sufficiently "competent" or "substantial" to raise a "genuine issue of fact regarding the validity of the blood alcohol test results."

Of course, a breath test only reveals the drunk driver's BAC "at the time the test is given," and not at the time the driver was driving. *See Meyer v. Director of Revenue*, 34 S.W.3d at 235 (*citing Rhodes v. Director of Revenue*, 994 S.W.2d at 599, n.2)). But Missouri courts have accepted the fact that

> there can occasionally be instances, especially where a driver is stopped very shortly after ingestion of alcohol, where the driver's actual [BAC] was lower–and perhaps even below the legal limit–at the time he was stopped, compared to the breath test result taken later which showed a higher reading.

Meyer v. Director of Revenue, 34 S.W.3d at 235-236. On the other hand, there are many instances when drunk drivers benefit from long delays[4] between the time of arrest and the time the driver takes a breath test, due to "'the evanescent nature' of alcohol in the bloodstream." *Id.* at 236 (*quoting State v. Kubik*, 456 N.W.2d 487, 497 (Neb. 1990)).

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[4] For example, delay could occur where a driver has oral intake (say, a penny) and a delay of 20 minutes also occurs, by statutory mandate, whenever a driver asks to speak to an attorney, as occurred here.

But when "the legislature provided for the admissibility of BAC, it had to know that there would be some period of time from the determination of probable cause until the test was given." *Green v. Director of Revenue*, 961 S.W.2d at 938 (*citing Hieger v. Director of Revenue*, 733 S.W.2d 491, 493 (Mo.App., E.D. 1987)). Consequently, the Director

> [I]s not required to show by scientific evidence that a driver had a BAC of .10 or more at the actual moment of driving when it can reasonably be assumed from the other evidence that his BAC at the time of driving was at least .10 percent.

Green v. Director of Revenue, 961 S.W.2d at 938-939 (*citing Hieger v. Director of Revenue*, 733 S.W.2d at 493) (*citing Walker v. Director of Revenue*, 922 S.W.2d 57, 59 (Mo.App., E.D. 1996)).

In this case, the trial court erred when it reversed the Director's suspension based on Dr. Watson's testimony, because Dr. Watson could only state that it was equally likely that Verdoorn's BAC was "either above or below" .10% at the time he was driving (LF 76). The trial court's decision required the Director to prove more than what she is required to establish.

Summary

The trial court misapplied the law when it reversed the suspension of Verdoorn's driver's license. And the Court of Appeals, Western District, needlessly and incorrectly tampered with that law when it decided to create its own test for whether or not a driver has come forward with a sufficient quantity of evidence to rebut the Director's prima facie case.

Evidence that amounts to a coin toss – that it is equally likely that Verdoorn's BAC was above or below .10% at the time he was driving – does not rebut the Director's prima facie case. Indeed, it proves little, if anything. This Court should reverse the trial court's decision with directions to reinstate the suspension of Verdoorn's driver's license.

Conclusion

In view of the foregoing, appellant Director requests that this Court reverse the trial court's judgment with instructions for the trial court to reinstate the Director's suspension of Verdoorn's driver's license.

Respectfully submitted,

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Certification of Service and of Compliance with Rule 84.06(b) and (c)

The undersigned hereby certifies that on this 21st day of April, 2003, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 6,414 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

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Associate Solicitor

Appendix

Appendix Index

1. Judgment A2-A4

2. §302.505 . . . . . A5

3. §302.530 . . . . . A6-A7

4. §302.535 . . . . . A8-A9

5. Respondent's Exhibit A A10-A23

302.505. Determination by department to suspend or revoke license, when made, basis – final, when. – 1. The department shall suspend or revoke the license of any person upon its determination that the person was arrested upon probable cause to believe such person was driving a motor vehicle while the alcohol concentration in the person's blood, breath, or urine was ten-hundredths of one percent or more by weight, based on the definition of alcohol concentration in section 302.500, or where such person was less than twenty-one years of age when stopped and was stopped upon probable cause to believe such person was driving while intoxicated in violation of section 577.010, RSMo, or driving with excessive blood alcohol content in violation of section 577.012, RSMo, or upon probable cause to believe such person violated a state, county or municipal traffic offense and such person was driving with a blood alcohol content of two-hundredths of one percent or more by weight.

2. The department shall make a determination of these facts on the basis of the report of a law enforcement officer required in section 302.510, and this determination shall be final unless a hearing is requested and held. If a hearing is held, the department shall review the matter and make a final determination on the basis of evidence received at the hearing.

3. The determination of these facts by the department is independent of the determination of the same or similar facts in the adjudication of any criminal charges arising out of the same occurrence. The disposition of those criminal charges shall not affect any suspension or revocation under this section.

302.530. Request for administrative review, when made – temporary permit, duration – telephone hearings permitted, when – hearing, venue, conduct – decision, notice, final when – appeal for judicial review – rulemaking authority. – 1. Any person who has received a notice of suspension or revocation may make a request within fifteen days of receipt of the notice for a review of the department's determination at a hearing. If the person's driver's license has not been previously surrendered, it shall be surrendered at the time the request for a hearing is made.

2. At the time the request for a hearing is made, if it appears from the record that the person is the holder of a valid driver's license issued by this state, and that the driver's license has been surrendered as required, the department shall issue a temporary permit which shall be valid until the scheduled date for the hearing. The department may later issue an additional temporary permit or permits in order to stay the effective date of the suspension or revocation until the final order is issued following the hearing, as required by section 302.520.

3. The hearing may be held by telephone, or if requested by the person, such person's attorney or representative, in the county where the arrest was made. The hearing shall be conducted by examiners who are licensed to practice law in the state of Missouri and who are employed by the department on a part-time or full-time basis as the department may determine.

4. The sole issue at the hearing shall be whether by a preponderance of the evidence the person was driving a vehicle pursuant to the circumstances set out in section 302.505. The burden of proof shall be on the state to adduce such evidence. If the department finds the affirmative of this issue, the suspension or revocation order shall be sustained. If the department finds the negative of the issue, the suspension or revocation order shall be rescinded.

5. The procedure at such hearing shall be conducted in accordance with chapter 536, RSMo, not otherwise in conflict with sections 302.500 to 302.540.

6. The department shall promptly notify, by certified letter, the person of its decision including the reasons for that decision. Such notification shall include a notice advising the person that the department's decision shall be final within fifteen days from the date of certification of the letter unless the person challenges the department's decision within that time period by filing an appeal in the circuit court in the county where the arrest occurred.

7. Unless the person, within fifteen days after being notified by certified letter of the department's decision, files an appeal for judicial review pursuant to section 302.535, the decision of the department shall be final.

8. The director may adopt any rules and regulations necessary to carry out the provisions of this section.

302.535. Trial de novo, conduct, venue, traffic or associate judge may hear, when – restricted driving privilege, when, duration of. – 1. Any person aggrieved by a decision of the department may file a petition for trial de novo by the circuit court. The burden of proof shall be on the state to adduce the evidence. Such trial shall be conducted pursuant to the Missouri rules of civil procedure and not as an appeal of an administrative decision pursuant to chapter 536, RSMo. The petition shall be filed in the circuit court of the county where the arrest occurred. The case shall be decided by the judge sitting without a jury. The presiding judge of the circuit court may assign a traffic judge, pursuant to section * 479.500, RSMo 1994, a circuit judge or an associate circuit judge to hear such petition.

2. The filing of a petition for trial de novo shall not result in a stay of the suspension or revocation order. But upon the filing of such petition, a restricted driving privilege for the limited purpose of driving in connection with the petitioner's business, occupation, employment, or formal program of secondary, postsecondary or higher education shall be issued by the department if the person's driving record shows no prior alcohol related enforcement contact during the immediately preceding five years. Such limited driving privilege shall terminate on the date of the disposition of the petition for trial de novo.

3. In addition to the limited driving privilege as permitted in subsection 2 of this section, the department may upon the filing of a petition for trial de novo issue a restricted driving privilege for the limited purpose of driving in connection with the petitioner's business, occupation, employment, or formal program of secondary, postsecondary or higher education. In determining whether to issue such a restrictive driving privilege, the department shall consider the number and the seriousness of prior convictions and the entire driving record of

the driver.

4. Such time of restricted driving privilege pending disposition of trial de novo shall be counted toward any time of restricted driving privilege imposed pursuant to section 302.525. Nothing in this subsection shall be construed to prevent a person from maintaining his restricted driving privilege for an additional sixty days in order to meet the conditions imposed by section 302.540 for reinstating a person's driver's license.